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No. 1784

IN THE

Supreme Court of the United States

October Term, 1949

SS MONTROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

vs.

CARBON BLACK EXPORT, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
for the Fifth Circuit

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No._____

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SS MONROSA, HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, *Petitioners*

-VERSUS-

CARBON BLACK EXPORT, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment in the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 18, 1958.

Citations to Opinions Below

The memorandum opinion of the United States District Judge is unreported and appears at R. 32-33. The opinion of the Court of Appeals for the Fifth Circuit printed in Appendix "A" hereto, infra, p. 15, (R. 54-62) is reported in 254 F. 2d 297 (1958).

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 18, 1958. R. 63; p. 24, infra. The jurisdiction of this Court is invoked under 28 *U.S.C.*, Sec. 1254(1).

Questions Presented

Is a clause in a foreign shipowner's bill of lading in which Respondent (cargo owner) and Petitioner (vessel owner) agreed to adjudicate claims for damage to cargo in the courts of Genoa, Italy, a valid and enforceable agreement?

If such an agreement is valid, did the agreement of Respondent and Petitioner here include *in rem* actions against the vessel itself?

Statement

Invoking the admiralty and maritime jurisdiction of the United States, Respondent, Carbon Black Export, Inc., filed its original libel (R. 4-11), alleging the issuance of bills of lading by the Petitioner, covering a cargo of carbon black loaded at Houston, Texas, and New Orleans, Louisiana, in December, 1955, aboard the SS MONROSA, a vessel owned and operated by the Petitioner, and flying the Italian flag. This cargo was to be transported to the Italian ports of Genoa, Naples, Venice and Trieste. These bills of lading constituted the contract for carriage of this carbon black between Petitioner and Respondent. The cargo was damaged upon its arrival in Genoa, Italy, where it was discharged.

The libel (R. 4-11) both *in rem* against the MONROSA and *in personam* against Petitioner, prayed for damages

allegedly sustained by the Respondent by virtue of the damage to the cargo in the amount of $110,000.

To obtain security for its claim, Respondent had a warrant of seizure issued against the SS MONROSA at Houston, Texas, in connection with the *in rem* portion of the libel, and to obtain release of its vessel Petitioner filed a Stipulation to Abide Decree (R. 12) on April 9, 1956, and as is customary in admiralty matters, Petitioner likewise on the same day filed its Notice of Appearance (R. 49) and Claim of Owner (R. 50), incorrectly designated in the certified transcript of record as Claim of "Order".

The bill of lading (R. 20), the contract between the parties, contained certain express agreements embodied in Clauses 27, 28, 29 and 32 thereof,[1] that no legal proceedings

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[1] "Clause 27—Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

"Clause 28—Also, that this contract is governed by the law of the steamer, carrying the goods, but any average that may arise on the voyage to be adjusted according to conditions named on the reverse side."

"Clause 29—Also, that in regard to all and everything which is not regulated and provided for in the present contract of transport, the regulation of the Italian Commercial Code will be in vigour."

"Clause 32—This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such terms shall be void to that extent, but no further."

for loss or damage to the cargo would be brought by Respondent except in Genoa, Italy. Petitioner, in its Motion to Decline Jurisdiction (R. 14-20), while recognizing and acknowledging the jurisdiction of the United States District Court, moved the court to exercise its jurisdiction by granting specific performance of the agreement in the bills of lading to adjudicate the Respondent's damage claim in Genoa, Italy.

On July 27, 1956, Petitioner (Respondent in the admiralty action in the District Court) filed its Motion to Decline Jurisdiction (R. 14-20), and attached as part of its Motion to Decline Jurisdiction a photostatic copy of Bill of Lading No. 7 (R. 20), covering twenty-five bags of the cargo of carbon black loaded on the MONROSA at Houston for delivery to Genoa, Italy. A total of twenty-seven bills of lading were issued, as the libel (R. 4-11) alleges, and all of the printed terms thereon are identical to Bill of Lading No. 7 (R. 20).

The Respondent, Libellant below, filed the Affidavit of Carl G. Stearns in opposition to the Motion to Decline Jurisdiction (R. 21-28) on September 21, 1956.

In support of its Motion to Decline Jurisdiction (R. 14-20), Petitioner filed on October 2, 1956, the Affidavit of E. D. Vickery in support of the Motion to Decline Jurisdiction (R. 29-32).

The District Court granted the Motion to Decline Jurisdiction and filed its Memorandum Opinion on December 31, 1956, (R. 32) on the ground that the agreement to adjudicate cargo claims only in Genoa was not shown to be an unreasonable one. The District Court relied on the decision of the United States Court of Appeals for the

Second Circuit in *William H. Muller & Co. v. Swedish American Line, Ltd., et al.*, 224 F. 2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955). However, in order to preserve the security which Respondent had acquired by its seizure of the vessel and the posting by Petitioner of a release bond (R. 12) with surety in the amount of $100,000, the court conditioned its order sustaining the Motion to Decline Jurisdiction on delivery by Petitioner to Respondent of a good and sufficient bond in the same principal sum guaranteeing the payment of any final judgment that might be had in favor of Respondent against Petitioner's ship, the SS MONROSA, and further requiring that said bond be kept in effect by Petitioner until termination of the controversy involved in this suit. Such bond was executed, approved by Respondent's proctors, and timely filed and delivered (R. 33-36).

While the Motion was being considered by the District Court, Petitioner granted Respondent an extension of time in which to sue in Italy, since limitations was about to run. Subsequent to the District Court's decision in this action a suit has actually been filed by Respondent against Petitioner and its vessel in Genoa, Italy for this same cargo damage.

Upon appeal, the United States Court of Appeals for the Fifth Circuit reversed and remanded this cause to the District Court. The Court of Appeals based its reversal on two grounds:

1. That the agreement to adjudicate claims in Genoa was void because contrary to public policy, and

2. That the agreement did not include *in rem* actions against the vessel itself as well as *in personam* actions against Petitioner.

Reasons for Granting the Writ

1. The holding of the Court of Appeals that the agreement to adjudicate claims for cargo damage in Genoa is not enforceable because contrary to public policy is directly in conflict with three decisions of the United States Court of Appeals for the Second Circuit:

William H. Muller & Co. v. Swedish American Line, Ltd., et al., 224 F. 2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955);

The Geisha-Cerro De Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F. 2d 990 (2 C.A., 1951);

Murillo, Ltd., et al. v. The Bio Bio, et al., 227 F. 2d 519 (2 C.A., 1955), aff. 127 F. Supp. 13 (S.D. N.Y. 1955).

In these three decisions, the Court of Appeals for the Second Circuit recognized that agreements such as the one involved in this case had been criticized and attacked as being contrary to public policy, but this argument was expressly rejected in these three cases by the Court of Appeals for the Second Circuit. In so doing, the Court of Appeals for the Second Circuit held that such agreements are invalid only when unreasonable and that the enforceability of any such agreement depends upon its reasonableness.

While really basing its decision on its view that such agreements are contrary to public policy, the Court of Appeals for the Fifth Circuit attempts to avoid the direct holdings by the Court of Appeals for the Second Circuit to the contrary, by simply stating that the facts before the Court of Appeals for the Second Circuit in these three cases were materially different from those of the present case. Obviously, as is true in all cases, there are

some factual differences but a comparison of the factors which led the Court of Appeals for the Second Circuit to enforce the agreements in its three cases with the factors involved in this case demonstrates clearly that the factors involved here are substantially the same. A comparison of the decisions in the three cases from the Court of Appeals for the Second Circuit with the facts of this case which indicate that the only reasonable forum for the adjudication of this controversy is a Court in Genoa, demonstrates conclusively that had this matter been presented to the Court of Appeals for the Second Circuit for decision, the agreement would have been enforced or the Court of Appeals for the Second Circuit would have had to overrule its three previous decisions. The distinguishing factors advanced by the Court of Appeals for the Fifth Circuit in an attempt to distinguish this case from these three decisions of the Court of Appeals for the Second Circuit pale into insignificance when the factors indicating the reasonableness of the present agreement are considered.[2]

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[2] These factors are:

1. The vessel is owned by a Genoese corporation and its operations are directed therefrom. All records of the corporation relating to the vessel and its cargo are located there.

2. The vessel's crew are Italians, residing in Italy, and as possible witnesses, have no expectation of being in the United States at the time of trial. Since the voyage referred to in the Libel, the Captain of the vessel, patently an indispensable witness, has suffered a heart attack and is no longer aboard the vessel. No information is available in the record as to the whereabouts of other crew members or even whether they are still in the employ of Petitioner. Employment as a member of the crew of a vessel is characteristically transitory in nature, and certainly it is only the rankest kind of speculation to say that one or any of the MONROSA's foreign crew were aboard at the times mentioned and certainly it cannot be expected that they would be present at the time of trial in the United States where their

2. The holding of the Court of Appeals for the Fifth Circuit that the agreement in the bills of lading (R. 20),

oral and obviously more effective testimony could be obtained. This is true notwithstanding the fact that the MONROSA and other of the Petitioner's ships on occasions call at Gulf ports with crews aboard. At any rate, the MONROSA's crew is Italian and it resides in Italy and the obvious benefit of this factor and the probability that they would be available at the time of trial in Genoa is apparent. Certainly, their presence would be more desirable to a court than deposition testimony.

The fact that deposition testimony could have been obtained from the MONROSA's crew in April or in September of 1956 (assuming the personnel other than the Master was the same) should not influence the decision in this case, since the District Court ruled that Respondent who served notice for the taking of depositions two days after the filing of the Libel with no advance notice was not entitled to this deposition testimony when it was sought. In this connection, the District Court ruled after hearing oral argument that the notices to take depositions had to be vacated; first, because discovery depositions are not authorized in admiralty, and second, because depositions **de bene esse** cannot be taken before issue is joined. The Libel had been filed only two days before the notices of depositions were served and no responsive pleading was due for more than nine days after the depositions had been noticed. In any event, it would have been quite unjust to permit the depositions when Petitioner's counsel did not have, and could not obtain from Italy, full information on the facts of the case before the depositions were scheduled.

It is entirely possible that Respondent was not primarily concerned with obtaining the testimony of these witnesses on the merits of the claim, but, on the contrary, to attempt to bolster its contentions in opposition to Petitioner's motion to decline jurisdiction in an effort to avoid the agreement it had previously made to adjudicate claims in Genoa, Italy.

3. Of the four Italian ports listed where the carbon black was destined, Genoa was the first port reached by the SS MONROSA and it was there that all of the cargo that was capable of being delivered was discharged, the remainder being damaged to such an extent that it could not be delivered to the other Italian ports. Therefore, it was at Genoa, the place agreed upon for the adjudication of any cargo damage claims in the bills of lading,

and particularly Clause 27 thereof (R. 56; infra, p. 11) did not include libels *in rem* against the vessel, is directly

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where the cargo was discharged and surveyed, the damages segregated and the condition of the cargo noted, not only by Petitioner's representatives but by Respondent's representatives as well.

4. Clause 8 of the bills of lading provides that in the event of claims for short delivery and damage, the value of the cargo shall be determined as of its market value at the port of destination on the day of the vessel's arrival in the Italian port (Genoa). Accordingly, testimony as to the market value will have to be obtained exclusively in Genoa, Italy. This measure of damages (the value of the cargo at the port of destination on the date of its arrival) is the same measure as applied in courts of admiralty in the United States.

5. The Libel alleges damages to the cargo by seawater. Accordingly, the seaworthiness of the vessel before, at the beginning of, and during the course of the voyage will be one of the main issues in this case. All repairs and surveys of the vessel, both before the voyage in question and following its completion, were performed in Italy, and therefore all evidence and testimony regarding the inspections, repairs and seaworthiness in general will be available to the Italian Court in Italy, and not here. Testimony respecting the seaworthiness of the hull of the SS MONROSA when it departed Houston and New Orleans is primarily obtainable from Italian surveyors and from the crew of the SS MONROSA, since no complete hull surveys of the MONROSA's cargo holds were made by American surveyors at Houston and New Orleans prior to the vessel's departure on the voyage in question.

Petitioner has the burden of showing that it used due diligence to make the vessel seaworthy when the cargo was loaded in Houston and New Orleans, but while there may be some testimony on this issue available in Houston and New Orleans, the vast majority of it will have to come from the ship's crew, from the vessel's records in Italy and from Italian surveyors who had made periodic checks of the vessel's hull prior to this voyage and subsequent thereto.

6. General Average has been declared in Italy and all computations required in the adjudication thereof is being accomplished in Italy. Whether this is a general average situation or not is a matter that also must be resolved possibly by litigation in Italy.

contrary to the decision of the United States Court of Appeals for the Second Circuit in *Murillo, Ltd., et al. v. The Bio Bio, et al.*, 227 F. 2d 519 (2 C.A., 1955), affirming 127 F. Supp. 13 (S.D. N.Y., 1955).

While as the court below points out the *Muller* case[3] did not involve a libel *in rem* because the vessel was lost at sea, the even later decision of the Court of Appeals for the Second Circuit in *The Bio Bio* case involved both a proceeding *in rem* against three vessels and *in personam* against their owners. The agreement in *The Bio Bio* case referred solely to claims against the "carrier" and provided that suits against the carrier could be brought only in the courts of the City of Stockholm, Sweden. A comparison of the agreement in the present case with the agreement in *The Bio Bio* case indicates clearly both clauses were intended to cover legal proceedings of any kind in connection with cargo damage.[4]

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7. Respondent did not have to accept the agreement to adjudicate the claims in Genoa because of economic duress because Lykes Bros. Steamship Co., Inc., among other United States steamship lines, maintains regular services to these same Italian ports with vessels sailing from the Gulf to such ports each two weeks. (R. 30-31). Thus, had Respondent objected to the agreement in the Petitioner's bills of lading, its shipment could have been made on an American vessel whose bills of lading do not contain such clauses agreeing upon a foreign forum for litigation of disputes arising out of damage to the cargo. In these days of substantial subsidies to American steamship lines, it would seem desirable to help them meet foreign competition by encouraging American citizens to use American ships and thus avoid having to file damage claims in foreign countries while at the same time bolstering our American Merchant Marine.

[3] 224 F. 2d 806 (2 C.A.), cert. denied 350 U.S. 903 (1955).

[4] In **The Bio Bio** case the agreement was:

> "Any claims in connection with the goods carried under the bill of lading must be filed against the carrier in the City of Stockholm and settled according to Swedish law. . ."

Clearly the term carrier used in *The Bio Bio* case is a reference to the company owning the vessel and by definition, a carrier is, "A person or corporation undertaking to transport persons or property from place to place, by means of conveyance, either gratuitously or for hire . . ."[5] Nevertheless, in *The Bio Bio* case the Court of Appeals for the Second Circuit upheld the District Court's declination of jurisdiction of both the *in rem* and *in personam* actions brought in other than the agreed upon forum upon a showing that the agreement was not unreasonable, whereas, and in direct conflict with *The Bio Bio* case, the Court below, although announcing they were unable to find authority to the contrary, reversed the District Court's declination of the *in rem* feature of the libel.

3. The decision of the court below refusing to uphold the agreement of the parties both *in rem* and *in personam*, of necessity divorces entirely one form of proceeding from the other, and in so doing is contrary to the decision of the Court of Appeals for the Third Circuit in *Smith v. The MORMACDALE*, 198 F. 2d 849 (3 C.A., 1952),

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Clause 27 of the bill of lading involved here provided as follows:

"Also, that **no legal proceedings may be brought** against the Captain or shipowners or their agents in respect to loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other tribunal in the place or places where the goods are shipped or landed is incompetent, **notwithstanding that the ship may be legally represented there.**" (Emphasis supplied).

[5] **Black's Law Dictionary** (3rd Ed. 1933)

to a decision of the Court of Appeals for the Second Circuit in *Bennett v. SS Mormacteal, et al.*, 254 Fed. 2d 138 (2 C.A. 1958), affirming per curiam, 160 Fed. Suppl. 840 (E.D. N.Y., 1958) (petition for writ of certiorari filed June 11, 1958, No. 1063), and to an earlier decision of its own in *Samuels v. Munson Steamship Line*, 63 F. 2d 861 (1933).[6]

The decision of the court below in separating the *in rem* and *in personam* nature of relief permits the Respondent to avoid its clear contractual agreement with respect to *in personam* actions under the guise of an independent *in rem* proceeding which thereby abrogates completely the effects of its contractual agreement to adjudicate any claims for cargo damage in Genoa, Italy.

4. The question presented is not only one of tremendous national importance but of wide international concern to shippers and receivers of goods of all kinds and to ocean carriers trading to the United States, since almost all foreign shipowners' and operators' bills of lading contain agreements to adjudicate claims in the country of the vessel's flag similar to the agreement in this case. Clearly,

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[6] In these cases, longshoremen had filed actions **in rem** against the vessel only in an attempt to recover compensatory damages from the vessel **in rem**, when they could not recover such damages against the vessel owner **in personam** because the longshoremen were relegated to their rights under the Longshoremen's & Harbor Workers' Compensation Act against their employer, the vessel owner. In these cases, it is held that an action **in rem** against the vessel cannot be maintained since the vessel is not such a separate and independent person from the vessel owner as to make it a legal entity against which the longshoremen's claims can be asserted, because this would permit the longshoremen to recover indirectly compensatory damages from their employer, the vessel owner, when they could not recover them directly from their employer in an **in personam** action.

it can be anticipated since the decisions of the Court of Appeals for the Second Circuit, that foreign shipowners relying on such agreements will, whenever a balance of convenience for litigation in the agreed upon forum appears in their favor, assert such agreements entered into with the cargo shippers or receivers upon the filing of libels against them in the United States. As this Court has never passed directly on the enforceability of such agreements and because of their national and international importance the questions presented should be settled by this Court.

The far reaching importance of the question presented is evident from the proceedings of the Maritime Law Association of the United States which has formed a special committee from its membership to consider the decisions of the Court of Appeals for the Second Circuit regarding jurisdiction and forum, specifically the *Muller (The Oklahoma)* case and the *Murillo, Ltd. (The Bio Bio)* decision. As Appendices B, C and D, there is attached hereto the proceedings of this Committee of the Maritime Law Association of the United States before the membership of the Association in its Documents Nos. 403, 409 and 414 at the Association's fall meeting on November 9, 1956, the full Committee report dated October 29, 1957, and the proceedings in the fall meeting of November 8, 1957, respectively. In Appendix B, infra, p. 25, from Document No. 403, there is a specific reference to the then pending decision of the court below.

These documents strikingly reflect not only the importance of these questions to the Admiralty Bar of this country, but the almost equally divided views of the Admiralty Bar on them. An authoritative decision from this Court is needed to settle these differences.

5. While recognizing the distinction between agreements such as are involved herein, clearly contractual, and the non-contractual doctrine of *forum non conveniens*, there can be no question but what the enforceability of such agreements generally is based, for its particular showing of reasonableness, on a showing similar to that needed to effectively invoke the doctrine of *forum non conveniens*. Therefore, in this respect the exercise of this Court's power of supervision over such a Federal jurisdictional and procedural issue so akin to the doctrine of *forum non conveniens* is highly desirable.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

E. D. VICKERY,
Counsel for Petitioner

July ——, 1958

APPENDIX A

In The

United States Court of Appeals

For The Fifth Circuit

No. 16667

CARBON BLACK EXPORT, INC.,
Appellant,

versus

SS MONROSA, Her Engines, Tackle, Etc., and NAVIGAZIONE ALTA ITALIA,
Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(April 18, 1958.)

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: This appeal presents the question whether the court below correctly declined jurisdiction (on the ground that the bills of lading vested exclusive jurisdiction in Italian Courts) of a libel for damages to and nondelivery of cargo, brought by an American citizen against the ship upon which the cargo

was loaded and against the owner of the ship. In December, 1955, the libelant, Carbon Black Export, Inc., a manufacturer an exporter of carbon black, delivered to, and shipped on board, the SS MONROSA at Houston, Texas and New Orleans, Louisiana about 30,000 bags of carbon black. The shipments to three Italian ports were covered by twenty-seven bills of lading, all on the same printed form.

Upon arrival of the MONROSA at the first Italian port, a portion of the shipment was delivered in damaged condition, and that destined for the other two Italian ports was never delivered at all. Libelant claimed damages in the sum of $110,000.00.

The libel was filed in the court below upon the return, some three months later, of the MONROSA to Houston, Texas and prayed that process issue against the MONROSA, her engines, tackle, etc., and that all persons claiming any right, title or interest in the steamship be cited to appear and that the steamship be condemned and sold to pay libelant's demands. Besides the *in rem* action against the MONROSA, Navigazione Alta Italia, the owner of the vessel, was made a respondent.

Six days after the filing of the libel respondent Navigazione filed a "Stipulation to Abide Decree," reciting that the *in rem* proceeding had been brought against the SS MONROSA and that Navigazione had filed a claim[1]

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1 The verified claim, filed on the same date, is in these words:

" CLAIM OF ORDER

"And now appears NAVIGAZIONE ALTA ITALIA, for the interest of itself as owner of the SS MONROSA, her

to the vessel, and including this language: ". . . . the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of said claimant or its surety, execution may issue against their goods, chattels and land for the sum of $100,000.00." This stipulation, on which National Surety Corporation was surety, was conditioned "that the claimant above named shall abide by and pay the money awarded, including costs of court, by the final decree rendered in the cause by this court, or in case of an appeal by the appellate court."

About three months thereafter respondent Navigazione filed a motion praying that the court below decline jurisdiction of the cause based upon the terms of the bills of lading, chiefly the following provision:

> "Clause 27 — Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

The motion set up grounds which respondents contended established the reasonableness of this provision. Affidavits were thereupon filed by one of the proctors for libelant

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engines, etc., before this Honorable Court, and makes claim to the said SS MONROSA as the same is proceeded against at the instance of CARBON BLACK EXPORT, INC., and the said claimant, NAVIGAZIONE ALTA ITALIA, avers that it was at the time of the filing of the libel herein, and still is, the true and bona fide owner of the said SS MONROSA, her engines, etc., wherefore, it prays to defend accordingly."

opposing the motion, and one of the proctors for respondents favoring it. The facts upon which the court below acted were set forth in the motion and the two affidavits.

The District Court filed a memorandum opinion[2] and entered a final decree reciting that it was "of the opinion that it has not been shown that the agreement in the bills of lading between Libellant and Respondents to sue or be sued only in the Courts of Geno, Italy, is unreasonable," and granting the motion of respondents to decline jurisdiction and canceling and discharging the stipulation to abide decree filed by the respondent-claimant. Libelant appeals, setting forth its grounds in detail;[3] and respond-

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2 "Since the agreement (bills of lading) between Libelant and Respondents to sue or be sued only in the Courts of Genoa, Italy, and because it is not shown that said agreement is unreasonable, this Court will decline jurisdiction of this case; conditioned, however, that Respondents shall, within fifteen (15) days from date hereof, deliver to Libelant a good and sufficient bond, in the principal sum of one hundred thousand dollars ($100,000.00) guaranteeing the payment of any final judgment that may be had in favor of Libelant against Respondent's ship, The SS Monrosa, . . . See William H. Muller & Co. vs. Swedish American Lines, Ltd., et al, 224 F.2d 806, 1955, . . . Cert. den. 350 U.S. 903 . . ."

3 That it was a citizen of the United States; that respondent Navigazione operated a fleet of cargo ships between Houston and other Gulf ports and Italian and other Mediterranean ports and maintained regularly scheduled service between them; that the MONROSA was in port at Houston from April 7th to April 10th, 1956; that the bills of lading were printed in English; that a general appearance had been entered on behalf of respondents constituting a waiver of the claim against the court's jurisdiction; that Clause 27 of the bill of lading did not bar suit **in rem** against the MONROSA; that the bills of lading provided that the Carriage of Goods by Sea Act of the United States would form a part of the bills of lading and the United States Courts were in the best position to apply them; that libelant had the choice of forum and its choice should be respected; that the bills of lading were issued in the United

ents point to the motion to decline jurisdiction filed by Navigazione, and the affidavit of its proctor filed as representative of the "Respondents" as spelling out their contentions that the action of the court below was correct.[4]

We agree with libelant that the court below was in error in granting the motion to deny jurisdiction under the facts of this case. Particularly is this true with respect to the proceeding *in rem* against the ship itself. As to this feature of the case, the decision of the Second Circuit in

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States and partly performed here; that testimony of the condition of the carbon black when loaded and of the MONROSA at the time of loading was available only in the United States and that it had endeavored to take the depositions of the MONROSA's crew while it was docked at Houston, but that such effort had been arrested by the court below at the instance of respondents; and that under the circumstances Clause 27 was illegal and that it had no application under the facts set forth.

[4] That the bills of lading provided that they were governed by the law of the steamer and the regulations of the Italian Commercial Code; that the vessel was owned by a Genoese corporation and its witnesses were Italians residing in Italy with no expectation of being in the United States at the time of trial; that the damage of the cargo was surveyed upon arrival at Genoa and the witnesses with respect to such damage were located there; that the market value of the cargo should be determined as of the market price at the port of destination; that the seaworthiness of the vessel before and during the voyage could be proved only by Italian witnesses; that the captain of the MONROSA had suffered a heart attack and was no longer aboard the vessel; that all of the cargo was discharged at Genoa, the remainder being damaged to such an extent that it could not be delivered to the other Italian ports, and the witnesses having knowledge thereof were situated in Genoa; that Italy has been a maritime nation for centuries and its courts were familiar with the U. S. Carriage of Goods by Sea Act and were capable of giving effect to it; and that because of the provisions of the bill of lading and also under the doctrine of forum non conveniens, the court below correctly declined jurisdiction.

Muller[5] has no application. The ship there involved had been lost at sea and there was no *in rem* action. The clause of the bill of lading there involved[6] is broader than that in the case before us. The language there encompassed "any claim against the carrier arising under the bill of lading," while the language of the exclusionary clause here was confined to legal proceedings brought against the Captain or ship owners or their agents. There is nothing in Clause 27 which has any tendency to establish that the parties intended that it should be made applicable to an *in rem* proceeding against the ship itself.

What we said recently in *Motor Distributors, Ltd. et al. v. Olaf Pedersen's Rederi*[7] is persuasive here, although we were considering the general question of whether justice would be better subserved by retaining or declining jurisdiction rather than the terms of an exclusionary clause:

> "Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean-going carriers it seems that one of the most universally recognized rules of law is that which gives the right to libelant, possessing a maritime lien against a vessel, to

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5 224 F. 2d 806, cert. den. 350 U.S. 903. Neither did the other two cases from the same Circuit so heavily relied upon by appellees, the Bio Bio case, 227 F.2d 519, and the Geisha case, 187 F2d 990, involve actions **in rem**. Appellees cite no authority wherein an exclusionary clause similar to that here involved has been held to apply to an action **in rem**.

6 "Jurisdiction. Any claim against the carrier arising under this bill of lading shall be decided according to Swedish law, except as provided elsewhere herein, and in the Swedish courts, to the jurisdiction of which the carrier submits himself."

7 1957, 239 F.2d 463, 467.

proceed in rem in the jurisdiction where the vessel is found."

Finding no authorities to the contrary, and feeling that the exclusionary clause relied on by respondents does not in terms apply to *in rem* proceedings, we hold that the court below was in error when it granted the motion to decline jurisdiction of the *in rem* feature of the libel.[8]

We are of the opinion also that the court below should have denied the motion of respondent Navigazione to decline personal jurisdiction as to it. In essence, the motion was based upon Clause 27 as buttressed by the doctrine of forum non conveniens. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.[9]

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8 It is of no importance that respondent Navigazione posted a bond to release the MOROSA. With respect to that action appellees say in their brief: ". . . in order to preserve the security which appellant had acquired by its seizure of the vessel . . . , the court conditioned its order on delivery by appellees to appellant of a good and sufficient bond . . ."

9 The rule is thus epitomized in the headnote of the article on Contracts, 17 C.J.S. §229, p. 603: "Contract provisions intended to oust courts of their jurisdiction in advance, as distinguished from provisions merely imposing conditions on the exercise of the right to sue, are void. This rule has been frequently considered in determining the validity of contracts as to venue, periods of limitation, notice or demand, and evidence."

And see also 14 Am. Jur., Courts, §196, pp. 389-390 which thus summarizes the rule: "Both in England and the United States it has been decided in a great number of cases, and conceded in an equally large number of other cases, to be settled law that the jurisdiction of the courts cannot be ousted by the private agreement of individuals made in advance, that the private persons are incompetent to

We do not find it necessary to espouse or reject the position taken by the Court of Appeals of the Second Circuit in the cases mentioned above, which are relied upon as marking a departure from this general rule.[10] The facts before that Court in those cases were, in each instance, materially different from those before us. In addition to those already discussed, it is important to note that the contracts of carriage here were made in the United States and were partially performed here, that the bills of lading specifically adopted the Carriage of Goods by Sea Act of the United States as part of their provisions and were printed in English, tending to indicate that the parties recognized that the courts of the United States were in a good position to pass upon the rights of the parties to them. It is further noteworthy that the testimony of the crew of the MONROSA was sought by libelant and resisted by respondents when the crew were in Houston; and, finally respondents invoked the jurisdiction of the court below in general terms and rested upon this action several months before challenging that jurisdiction by its motion.

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make any such binding contracts, and that all such contracts are illegal and void as against public policy."

Cited to both texts are a number of decisions of the Supreme Court of the United States; and cf. our decision in Burt v. Isthmus Development Co., 1955, 218 F.2d 353, 356, cert. den. 349 U.S. 922.

10 Those cases do not purport to construe such a provision as Clause 27 as creating an absolute right but one to be accorded if all of the facts of a given case make it reasonable to give it effect. Several District Courts have considered the cases and have refused to decline jurisdiction despite the presence of similar clauses, e.g., Chemical Carriers, Inc. v. L. Smit & Company's etc. S.D. N.Y., 1957, 154 F. Supp. 886; Sociedade Brasileira etc. v. S. S. Punta Del Este, etc., D. of N.J., 1955, 135 F. Supp. 394; and St. Paul Fire & Marine Ins. Co. v. The Republica de Venezeula et al, S.D. N.Y., 1952, 105 F. Supp. 272.

As heretofore pointed out, respondents pitch their argument to a considerable extent upon the doctrine of forum non conveniens, recognizing that Clause 27 alone did not provide a firm basis upon which to stand. The rule governing application of that doctrine is thus expressed by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 1946, 330 U.S. 501, 508, "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

The judgment of the court below granting the motion to decline jurisdiction and vacating and discharging the stipulation to abide the decree of the court below is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true copy
Test. EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By CLARA R. JAMES
Deputy
New Orleans, Louisiana
(Seal)

JUDGMENT.

Extract from the Minutes of April 18, 1958.

CARBON BLACK EXPORT, INC.,

No. 16667. versus

SS MONROSA, Her Engines, Tackle, Etc., and NAVIGAIONE ALTA ITALIA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court granting the motion to decline jurisdiction and vacating and discharging the stipulation to abide the decree of said court, in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, SS Monrosa, Her Engines, Tackle, Etc., and Navigazione Alta Italia, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX B

DOCUMENT No. 403

Committee to Consider the Decisions of the Courts of the Second Circuit Regarding Jurisdiction and Forum

Mr. Nicholas J. Healy, III, Chairman, read the following report:

The Committee met and duly considered the decision of the United States Court of Appeals for the Second Circuit in *The Oklahoma (Wm. H. Muller & Co., Inc., v. Swedish American Line, Ltd.)*, 224 F. 2d 806, 1955 A.M.C. 1687, cert. denied, 100 L. Ed. 103, 1955 A.M.C. 2406, and the decision of the United States District Court for the Southern District of New York in *The Bio Bio*, 127 F. Supp. 13, aff'd 227 F. 2d 519 (C.C.A. 2). Consideration was also given to *The Punta Del Este*, 135 F. Supp. 394, 1955 A.M.C. 2288, a decision of the United States District Court for the District of New Jersey.

In *The Oklahoma*, supra, Judge Conger exercised his discretion and declined to retain jurisdiction of a suit brought by a New York corporation to recover for the loss of a shipment of 1,000 bags of cocoa beans when the Oklahoma sank while en route from Gothenburg, Sweden, to United States Atlantic ports. Respondents moved for an order declining jurisdiction and dismissing the libel on the ground that the parties had agreed to jurisdiction in Swedish Court, and upon the ground of *forum non conveniens*. Respondents pleaded the bill of lading, including the jurisdictional clause, reading as follows:

> "JURISDICTION. Any claims against the carrier arising under this Bill of Lading shall be decided according to Swedish law, except as provided elsewhere

herein, and in the Swedish courts, to the jurisdiction of which the Carrier submits himself."

The District Court held that there was nothing in the Carriage of Goods by Sea Act which invalidated such a stipulation, and, since there was no showing that libelant could not obtain justice in Sweden, gave the agreement the full effect. The Court also stated:

> "Were I to reach the question of *forum non conveniens*, I would hold to the same conclusion in view of the agreement plus the fact that the Oklahoma is Swedish owned, was built in Sweden, and all the crew members reside there."

On appeal the Court of Appeals agreed that the Carriage of Goods by Sea Act, 1936, did not invalidate the jurisdictional agreement and held that the enforcement of a clause such as the one quoted would not be in contravention of public policy. The Court said "that in each case the enforceability of such an agreement depends upon its reasonableness." The Court of Appeals held that the District Court did have jurisdiction, but went on to say:

> "But if in the proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented."

The Court of Appeals then considered "the setting of this case", as shown by respondents, and held:

"On this showing, we think the judge below could rightly conclude that the jurisdictional agreement was not unreasonable and that the adherence of the parties to that agreement, which for aught that appears was freely given, should be given effect. In declining jurisdiction and dismissing the complaint we think he was well within the limits of lawful judicial discretion."

In *The Bio Bio*, the Southern District Court followed *The Oklahoma*.

In *The Punta Del Este*, the District Court for the District of New Jersey retained jurisdiction of a suit between foreigners despite an agreement as to foreign jurisdiction.

One additional case involving similar issues is pending in a District Court in the Fifth Circuit.

[4076]

It is the view of a majority of the Committee that it would be inadvisable for this Association to take any action with respect to *The Oklahoma* decision at the present time, for the following reasons:

1.) A similar case is now pending in a district court in the Fifth Circuit, and it is conceivable that that case may eventually come before the Court of Appeals and possibly before the United States Supreme Court. It is therefore conceivable that before long *The Oklahoma* case may be overruled.

2.) If legislation to counteract the effect of *The Oklahoma* were enacted, it would limit the exercise of judicial discretion to decline jurisdiction in cases where the particular Court feels that justice would best be served by declining it. This would be a very drastic limitation by

the legislature of a prerogative which traditionally has been considered that of the judiciary.

3.) Thus far, there has been no serious prejudice to American litigants as a class as a result of *The Oklahoma* decision.

4.) More time will have to elapse before the full import of *The Oklahoma* decision can be properly evaluated.

5.) The effect of *The Oklahoma* decision is not so momentous as to warrant the sponsorship, by this Association, of a bill to counteract its effect, merely because a substantial number, or perhaps even a bare majority of the members of the Association, may disagree with the United States Court of Appeals for the Second Circuit. It is felt that this Association should not sponsor Congressional legislation to counteract the effect of a particular court decision unless a substantial majority of the members feel that the decision is contrary to the objectives of the Association.

The Committee recommends that it be continued, at least until the next meeting of the Association, for the purpose of considering and reporting on any similar decisions which may be rendered, but that no further action be taken by the Association at this time.

Respectfully submitted,

NICHOLAS J. HEALY, 3RD,
Chairman
NORMAN M. BARRON
HENRY C. BLACKISTON
JOHN F. GERITY
GORDON W. PAULSEN

[4077]

Mr. Henry N. Longley read the following minority report:

We dissent from the Report of the Committe to be submitted to the Association at its meeting to be held on November 9, 1956.

At the meeting of the Committee on November 1, 1956, and with particular reference to the decision of the Court of Appeals for the Second Circuit in *The Oklahoma*, 224 Fed. 2d 806, Mr. Longley moved that the Committee prepare and submit to the Association for its consideration a bill for ultimate submission to the Congress of the United States, making invalid a clause in a shipping contract requiring an American citizen suing in his own right, to pursue his rights in some foreign country, such as that of the flag of the carrying ship.

The motion was defeated. The majority of the Committee thought that no action should be taken until more and similar cases concerning the question of an American citizen's absolute right to maintain jurisdiction in American courts were decided.

We believe that the decision of the Court of Appeals for the Second Circuit in *The Oklahoma* case and the denial by the United States Supreme Court (350 U. S. 903), of the petition for a writ of certiorari are sufficient indications that the courts, finding no prohibition in the United States Carriage of Goods by Sea Act or any other Act against "jurisdiction" clauses in bills of lading, will continue to hold that a citizen of the United States is bound by such clauses to institute actions in a foreign country where there is a bill of lading clause containing that limitation of action.

We think the state of affairs which these clauses and *The Oklahoma* case has created is unfair to American citizens engaged in international commerce. Under this decision an American citizen may be deprived of redress in our courts by the simple expedient of a foreign ship-owner inserting in its bill of lading a provision requiring suit in the country of the ship's flag.

The fact that the Court of Appeals for the Second Circuit based its holding on the ground that the facts of *The Oklahoma* case made the bill of lading clause "reasonable", only serves to confuse rights about which there should be no question in the minds of American businessmen.

Furthermore, the duty under the clauses in question to sue in a foreign country practically eliminates any right of action which a cargo owner may have where the amount of the loss does not justify referral of the case to a foreign country. Moreover, where the ship flies the

[4078]

flag of a foreign country which has a system of law quite different from our own—such as, Japan, for instance—the decision in effect destroys the rights of an American citizen.

This windfall to foreign ship owners, we believe, will not be condoned by Congress which sought through "the Carriage of Goods by Sea Act" to remove long standing inequities against cargo owners resulting from other unilateral clauses in ocean bills of lading.

Respectfully,

HENRY N. LONGLEY
GEORGE B. WARBURTON

Mr. Longley argued that bill of lading clauses which take from American citizens the right to appeal to American courts destroy the rights of American citizens whose cargo is carried on foreign flag ships. He urged the adoption of the Minority Report.

Mr. Healy moved the adoption of the Majority Report and the motion was duly seconded.

Mr. William G. Symmers spoke in opposition to the motion. He pointed out that under the law of other countries liability can be limited to less than the United States limitation of $500 per package and that in South American countries and Japan liability can be limited to zero. Thus such clauses give an advantage to foreign shipowners in competition with American shipowners.

Mr. Knauth urged that legislation be proposed which would assure the protection of United States courts to foreign corporations owned and controlled by United States citizens. The President ruled that Mr. Knauth's remarks were not germane to the present motion, though they would be pertinent to a motion to approve the Minority Report.

Mr. MacDonald Deming spoke in support of the motion. He pointed out that the decision in *The Oklahoma* was not a holding that the clause was valid under all circumstances and that it would have to be determined whether or not enforcement of the clause was reasonable under the facts of each case. The effect of *The Oklahoma* was in his opinion only to shift the burden of proof of *forum non conveniens*. He therefore urged that no action be taken until a body of judicial opinion develops.

[4079]

Mr. Edward B. Hayes of Chicago spoke in opposition to the motion. He expressed the opinion that the doctrine of *The Oklahoma* would be discouraging to a young port such as Chicago.

Mr. Cyril F. Powers suggested that, if something were going to be done, action should be taken to control the increasing tendency of foreign underwriters to bring their claims to the United States to collect under circumstances where they cannot collect under their own laws.

The President summarized the question before the house as being whether to go along with the majority, which would do nothing for the present, or to go along with the minority, which would do something but would take into account various suggestions, such as that made by Mr. Powers. Mr. Longley agreed with this summary.

Mr. Joseph T. McGowan spoke in opposition to the motion. He mentioned a case of his pending in Texas, in which the Court has a motion to decline jurisdiction under advisement and may not decide the motion until after expiration of the time to sue. If he should lose the motion, it might be too late to sue abroad. He therefore urged adoption of the Minority Report.

Mr. David P. Dawson spoke in support of the motion. He suggested the following considerations: (1) that our courts could be relied upon not to decline jurisdiction in such a way as to cause any real injustice, (2) that shippers can protect themselves by shipping only on American ships and that shippers can get protection through the conferences, and (3) that we should carefully consider

the possibility of retaliatory action by foreign countries. He therefore urged adoption of the Majority Report.

Mr. Henry C. Blackiston pointed out that many who had spoken to the motion were pleading special interests which they happened to represent and that the vote would probably be along similar lines. He suggested that it would be inappropriate for the Association, representing such diverse interests, to take a position on this subject but that the special interests involved should act through their respective trade organizations.

Mr. Longley summarized the discussion in opposition to the motion, emphasizing that *The Oklahoma* is against American interests. Mr. Heady summarized in support of the motion, emphasizing that it would be a dangerous

[4080]

precedent for the Association to take a stand supported by only some, or possibly a bare majority, of the membership.

The question was put and, on a show of hands, the motion was lost by a vote of 30 in favor and 39 opposed.

Mr. Longley moved the adoption of the Minority Report and the motion was duly seconded.

The question was put and, on a show of hands, the motion was carried by a vote of 37 in favor and 33 opposed.

Mr. Herbert M. Lord suggested that any representation made to any official body be accompanied by an indication of the closeness of the vote.

Mr. Deming, seconded by Mr. Knauth, moved for reconsideration on the basis that the Majority and Minority Reports should be put before the entire membership before

a decision was made. The motion was ruled to be out of order, since Mr. Deming had voted against the Minority Report.

Mr. Norman M. Barron moved that any bill prepared for submission to the Association be circulated to the entire membership before any action is taken thereon. The motion was duly seconded and unanimously carried.

Mr. Philp K. Verleger suggested that a new committee be appointed to draft the proposed legislation and that the majority of such a committee should not be opposed to the principle of the legislation.

The President stated that he would at least enlarge the present committee.

APPENDIX C

[4173]

DOCUMENT NO. 409.

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

Report of the Committee to Consider Decisions of the Courts of the Second Circuit Regarding Jurisdiction and Forum

At the meeting of the Association, held November 9, 1956, a majority of the former committee submitted a report discussing the decisions of the U. S. Court of Appeals for the Second Circuit in *The Oklahoma*, 224 F. (2d) 806; 1955 A. M. C. 1687; of the Southern District of New York in *The Bio Bio*, 127 F. Supp. 17, affirmed 227 F. (2d) 519 (C. A. 2) and of the District of New Jersey in *The Punta del Este*, 135 F. Supp. 394. It was held in the first two cases cited that United States courts should refuse to take jurisdiction of suits filed by United States citizens as cargo owners against foreign vessel owners if the bill of lading contracts contain provisions requiring that suits based on breach of their terms, be filed in the courts of the country of the ships' flags.

The report of the majority of the former committee recommended that no action be taken by the Association in relation to remedial legislation. A minority report was filed which pointed out that the decisions made it clear that without a prohibition in the United States Carriage of Goods by Sea Act or some other act against "jurisdictional" clauses in bills of lading, courts would continue to hold that a citizen of the United States having claims against a foreign vessel owner for damage to cargo, may not

look to the courts of his own country for justice, but is bound to institute any suit in a foreign country where there is a bill of lading provision limiting suit to the country of the ship's flag. It was recommended that a bill be introduced to amend the Carriage of Goods by Sea Act in this regard.

A motion to adopt the majority report having been lost, the Association adopted the minority report and directed that any proposed legislation which the Committee might advance for the approval of the Association, be circulated among the entire membership of the Association before any action should be taken on the Committee's recommendation.

[4174]

It having been suggested at the meeting of the Association that a new committee be appointed to draft the proposed legislation with a majority not opposed to the principle of remedial legislation, the president re-appointed the former committee with the addition of three new members.

Those members of the present committee who sign this report recommend to the Association that a bill be introduced in Congress amending the Carriage of Goods by Sea Act and that the Association actively work for adoption by Congress of this amendment. The amendment proposed by the Committee is to add the following language after Sec. 9:

> Any clause, covenant or agreement in a contract subject to this Act requiring the prosecution of claims in the courts of a foreign country shall be null and void and of no effect. A citizen of the United States of America suing in his or its own right to recover damages from a carrier for breach of such a contract

shall not be barred from prosecuting his or its suit in the courts of the United States of America.

The purpose of the proposed amendment is, we think, clear. Prior to the decision in *The Oklahoma* (supra) it had long been the established law that a contractual provision seeking to oust a United States court of jurisdiction was void. The result of the decisions in *The Oklahoma*, *The Bio Bio*, and in the most recent case of *The Monrosa*, decided in the Eastern District of Texas (not reported), inhibiting a United States citizen from pursuing his rights against a foreign vessel owner in a United States court is, we think, so strange and inequitable as to require legislative action. The adoption by the Association, at the meeting of November 9, 1956, of the minority report of the former committee, makes it apparent that the Association as a whole agreed that legislation is called for.

Respectfully submitted,

RUSSEL A. MACKEY;
RUSSEL T. MOUNT;
WILLIAM G. SYMMERS;
GEORGE B. WARBURTON;
HENRY N. LONGLEY, Chairman.

October 29, 1957.

[4175]

The undersigned members of the present Committee remain opposed to the introduction of the proposed bill, for the reasons stated in the report submitted at the 1956 Fall Meeting by a majority of the Committee as it was then constituted. That report, which failed of adoption by a vote of 39 to 30 of the members of the Association present

and voting, appears at pp. 4074-6 of M. L. A. Document No. 403 (Minutes of the 1956 Fall Meeting).

It is still felt there has been no serious prejudice to American litigants as a class as a result of *The Oklahoma* decision, and that this Association should not sponsor legislation to counteract the effect of isolated court decisions unless a substantial majority of the members believe that the decisions are contrary to the objectives of the Association.

In any event, if the Association is going to sponsor a bill to amend the Carriage of Goods Act, the undersigned members of the Committee feel that the bill should not be limited to the proposed addition of Section 9a, but should be enlarged so as to cover other amendments as well. For example, many members of the Association would probably be in favor of an amendment which would nullify the effect of the "both-to-blame" decision *(The Esso Belgium*, 343 U.S. 236, 1952 A.M.C. 659).

Respectfully submitted,

NORMAN M. BARRON,
HENRY C. BLACKISTON,
JOHN F. GERITY,
NICHOLAS J. HEALY, 3rd,
GORDON W. PAULSEN.

APPENDIX D

[4226]

DOCUMENT No. 414

Committee to Consider the Decision of the Courts Regarding Jurisdiction and Forum:

Mr. Henry N. Longley, Chairman of the Committee, referred to the Committee's report, which had been circulated as Association Document No. 409, consisting of two dissenting reports each signed by five members of the Committee, hereinafter for convenience referred to as the "Majority Report" and the "Minority Report" respectively.

Mr. Longley moved the adoption of the "Majority Report" and spoke in support thereof. He argued that, under recent decisions, United States citizens are deprived of the right of choosing the forum in which to sue and that those who signed the "Minority Report" represented the interests of foreign shipowners.

Mr. Nicholas J. Healy, III, spoke in support of the "Minority Report". He argued that no court had abused its discretion in this regard in the past year. He also pointed out that the Association is deeply divided on this question, the "Majority Report" being in the interest of only one segment of the membership, and argued that the Association should not take a stand on a question as to which it is so divided.

[4227]

Mr. Longley's motion was duly seconded.

Mr. James M. Estabrook spoke in support of the "Minority Report" on the ground that the "Majority Report" does not substantially represent the great majority

of the Association and is therefore not a persuasive authority on which to go to Congress.

Mr. Charles S. Haight also spoke in support of the "Minority Report". He argued that the courts should not be deprived of their discretion to remit cases to foreign courts because in cases where many witnesses would have to be brought from abroad at great expense to require a trial in the United States would be an injustice. He also pointed out that the *Oklahoma* decision, while it reflected and talked of the Bill of Lading clause, relied on the discretion of the admiralty courts in declining to retain jurisdiction.

Mr. Haight also pointed out that a move to change the Carriage of Goods by Sea Act in one respect would raise the question of amending it in other respects.

Mr. George B. Warburton, speaking in support of the "Majority Report", argued that cargo interests had been prejudiced during the period since the *Oklahoma* decision and that the Association should delay no longer in the matter.

Mr. Norman M. Barron spoke in support of the "Minority Report", arguing that the supporters of the "Majority Report" had not made a showing of actual prejudice to the interests of United States citizens.

Mr. Warburton mentioned that in the *Oklahoma* litigation in Sweden, the cargo interests were ordered by the court to post a bond for $25,000 and encountered technical difficulties which they would not have met in a United States court.

Mr. John F. Gerity argued that the "Minority Report" is out of order in view of the vote of the Association on this subject at the 1956 Fall Meeting.

Mr. Michael F. Whelan spoke in opposition to the "Majority Report". Mr. Whelan argued that the proposed amendment to the Carriage of Goods by Sea Act was so worded that it would give rise to a number of disputes as to its meaning.

[4228]

Mr. William H. Maness, in opposition to the "Majority Report", argued that it proposed class legislation and would tend to destroy international uniformity of law. He also argued that the wording of the proposed amendment was not clear.

Mr. Philip K. Verleger suggested that the law should be clarified to define narrowly and clearly which cases should and which should not be remitted to foreign jurisdictions to avoid having two suits pending in different jurisdictions while awaiting a decision in the preferred jurisdiction.

The question was put and the vote was 46 "yes" and 78 "no", the motion being lost.

Mr. Martin P. Detels, Chairman of the Committee, reported with reference to the *Wilburn Boat Co.* case that it was an action begun in the State Court and removed to the Federal Court in Texas, where the trial court decided in favor of the underwriters who were sued on a marine policy which covered the boat against fire. The decision of the District Court was affirmed by the Court of Appeals, on the basis of the maritime law. Then the case was taken to the Supreme Court which held that it should be decided according to State law. It went back to the District Court which, on the same evidence as before, then found in favor of the insured on all points, on the basis of the Texas State law. It is now again on appeal to the Court of Appeals.